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No. 97-

In The Supreme Court of the United States

OCTOBER TERM 1997

CONRADO LOZANO,

Petitioner,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the First Judicial Circuit of Texas

PETITION FOR WRIT OF CERTIORARI

A. GLENN DIDDELL
Counsel of Record
THE DIDDEL LAW FIRM
1640 Mellie Esperson Building
815 Walker
Houston, Texas 77002
(713) 237-1000

TIMOTHY J. FALCON
THE FALCON LAW FIRM
5044 Lapalco Boulevard
Marrero, Louisianna 70072
(504) 341-1234

ATTORNEYS FOR PETITIONER

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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Question Presented

Whether a Texas appellate court, in reviewing a state trial court's refusal to give a mandatory FELA[1] jury instruction concerning assumption of the risk, must follow controlling Supreme Court precedent and determine as a matter of federal law that the trial court committed reversible error in refusing to give the instruction?

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[1] The Federal Employer's Liability Act, 45 U.S.C. §§51 et seq.

Parties to the Proceedings

Plaintiff/Petitioner:	Mr. Conrado Lozano
Defendant/Respondent:	The Atchison, Topeka and Santa Fe Railway Company[2]

[2] The Atchison, Topeka and Santa Fe Railway Company has subsequently merged with the Burlington Northern Railway Company. The resultant successor in interest is the Burlington Northern and Santa Fe Railway Company.

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Mr. Lozano petitions for a writ of certiorari to review the judgment of the Court of Appeals for the First Judicial District of Texas in this case.

Opinions, Judgments and Orders Below

The final judgment of the 152nd Judicial District Court of Harris County, Texas [the "Texas state court"], in Cause No. 93-144808, Conrado Lozano v. Atchison Topeka and Santa Fe Railway Company, entered on April 27, 1995 is included as Appendix A ["App. A"].

The judgment and opinion of the Court of Appeals for the First Judicial District of Texas [the "court of appeals"], filed on August 15, 1996, is included as Appendix B ["App. B"]. By order of the court of appeals, pursuant to Rule 90 of the Texas Rules of Appellate Procedure, its opinion and judgment [the "court of appeals' opinion"] were not published. [App. B at 17a].

The court of appeals' order denying Mr. Lozano's motion for rehearing with request for rehearing en banc, filed on January 27, 1997, is included as Appendix C ["App. C"].

The order of the Supreme Court of Texas denying Mr. Lozano's request for further, discretionary review of the court of appeals' opinion by application for writ of error, filed June 12, 1997, is included as Appendix D ["App. D"].

The order of the Supreme Court of Texas denying Mr. Lozano's motion for rehearing on his application for writ of error, filed on September 4, 1997 is included as Appendix E ["App. E"].

Statement of Jurisdiction

Mr. Lozano invokes the jurisdiction of this Court under 28 U.S.C. §1257. In Texas, the court of appeals' judgment is that of the highest court in the state subject to discretionary, further review by the Supreme Court of Texas. Mr. Lozano has exhausted all avenues of further, discretionary review before the supreme court by application of writ of error and then, after the application was denied, by motion for rehearing. The supreme court denied Mr. Lozano's motion for rehearing on September 4, 1997. [See App. E]. Mr. Lozano has timely invoked the jurisdiction of the Supreme Court as his petition for writ has been filed within ninety days after the last order of the Supreme Court of Texas denying discretionary review by motion for rehearing. See Supreme Court Rule 13(1) ("a petition for writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.").

Statute Involved

This case involves the construction and application of the Federal Employers' Liability Act ["FELA"], 45 U.S.C. §§53, 53, 54 and 56. These sections of the FELA are included as Appendix F ["App. F"].

Statement of the Case

On September 11, 1991, Mr. Lozano, while working as an employee of defendant/respondent Atchison Topeka and Santa Fe Railway Company ["Santa Fe"], sustained personal injuries in a work-related accident. At the time in question,

Mr. Lozano had been ordered by a Santa Fe supervisor in attendance to undertake a dangerous task and was injured as a result.

In 1993, Mr. Lozano filed a personal injury action under the FELA against Santa Fe in the Texas state court. Santa Fe denied liability and asserted, as an affirmative defense, that Mr. Lozano was contributorily negligent for his injuries.

The case was tried to a jury in March 1995. Mr. Lozano established that he was an employee of Santa Fe at the time he was injured, that he was being supervised by a Santa Fe supervisor and that the supervisor had ordered him to perform a dangerous task that had led to his injury. During the course of the trial, Santa Fe impermissibly raised the question of whether Mr. Lozano had assumed the risk of injury by virtue of his activities as a Santa Fe employee on the day in question.

Under controlling FELA law, when Santa Fe asserted the affirmative defense of contributory negligence and the evidence showed that Mr. Lozano was performing a dangerous task at the order of a Santa Fe supervisor, Mr. Lozano was entitled to a mandatory FELA instruction that the theory of the assumption of the risk, as made apparent through Mr. Lozano's implied consent to undertake the activities in question because of his employment by Santa Fe, could not be considered by the jury in ruling on Santa Fe's contributory negligence affirmative defense. See Jenkins v. Union Pacific R. Co., 22 F.3d 206, 212 (9th Cir. 1994); Koshorek v. Pennsylvania R. Co., 318 F.2d 364, 369-71 (3rd Cir. 1963); Hamrock v. Consolidated Rail Corp., 155 Ill.App.3d 55, 501 N.E. 2d 1274, 1279-80 (Ill.App. 1986). Mr. Lozano's right to the instruction also

arose separately by virtue of Santa Fe's interjection of the question of assumption of the risk into the case. See Fashauer v. New Jersey Transit Rail Operations, 57 F.3d 1269, 1975 (3rd Cir. 1995).[3]

At the end of the trial, Mr. Lozano requested the mandatory assumption of the risk instruction that Mr. Lozano's performance of a commanded task as part of his employment did not shift the risk of injury to him. The trial court denied Mr. Lozano's request. Mr. Lozano's proposed instruction is included as Appendix G ["App. G"].

After refusing to give the instruction, the court then submitted a general charge to the jury allowing it to impose negligence on Mr. Lozano without restriction. The jury, in answering the broad form questions in the charge, put sixty percent of the negligence on Mr. Lozano. For the jury's answers and the charge, see the charge which is included as Appendix H ["App. H"] at 33a-36a.

The trial court entered judgment based on the jury's answers thereby imposing sixty percent contributory negligence on Mr. Lozano and reducing his award accordingly. [See App. A at 5a].

Mr. Lozano appealed the judgment. In requesting his record for appeal, Mr. Lozano designated only that portion

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[3] To quote Fashauer, "[A]s a matter of law . . . when the evidence adduced at trial presents a danger that the jury might reduce a plaintiff's recovery based on the impermissible theory of assumption of the risk, then the trial judge should instruct the jury on how that doctrine differs from contributory negligence." Id., 57 F.3d at 1975.

of the record that documented, among other things, his FELA claim, Santa Fe's affirmative defense of contributory negligence, the basis for Mr. Lozano's request for the FELA instruction on the assumption of the risk, the trial court's denial of the request, the jury's verdict and the trial court's judgment.

On appeal, the court of appeals refused to consider the merits of Mr. Lozano's claim of trial court error in not giving the mandatory FELA instruction. The court indicated that, as Mr. Lozano had not brought the entire trial record forward on appeal, the question of error could not be determined, relying solely on the Texas harmless error rule:

> We cannot consider point of error one on the merits. Assuming without deciding that the trial court erred in refusing Mr. Lozano's requested instruction, Lozano has not brought a sufficient record before this Court to show that the error harmed him.

Rule 81(b)(1) provides:

> No judgment shall be reversed on appeal and a new trial ordered . . . on the ground that the trial court has committed an error . . . in the course of the trial, unless the appellate court shall be of the opinion that the error . . . amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause rendition of

> an improper judgment in the case.
>
> Tex.R.App.P. 81(b)(1). Jury charge error is reversible only, if in light of the totality of the circumstances, it probably caused the rendition of an improper judgment against the complaining party. [Citations omitted]. To determine whether an error in the jury charge is reversible, we must consider the entire record.

[App. B at 12-13a].

Mr. Lozano timely moved for rehearing. He argued that the Supreme Court's holding in Norfolk & W. Ry. Co. v. Liepelt set a controlling federal standard of appellate review that required the court of appeals to determine as a matter of law that the trial court committed reversible error in refusing to give a mandatory FELA instruction. Id., 444 U.S. 490, 492 (1980). Because the Supreme Court precedent represented by Liepelt controlled appellate review[4] in this instance, Mr. Lozano argued that state appellate procedural rules were inapplicable to the question of error; thus, Mr. Lozano's failure to bring a complete trial record up on appeal, for purposes of state harmless error rule analysis,

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[4] Liepelt generally stated the rule that state appellate review of trial court error in refusing to give an FELA instruction was controlled by federal, not state, law on appeal. Ibid. The specific FELA instruction in question there concerned the nontaxability of a jury's award in an FELA action which had been requested by the defendant railroad. Liepelt, 444 U.S. 491-2.

was of no consequence. As Mr. Lozano had made the predicate federal showing that the instruction was required, he argued his appellate record was complete and, under Liepelt, he had a substantive federal due process right under the Fourteenth Amendment of the Constitution to determination by the court of appeals as a matter of law that the trial court had committed reversible error in refusing to give the instruction.[5] See Liepelt, 444 U.S. at 492. Mr. Lozano also discussed on-point state court authority from Ohio where the Ohio mid-level appellate court had determined, as a matter of federal law, that a trial court's refusal to give an FELA instruction on assumption of the risk was reversible error without more. See Hamrock, 151 Ill.App.3d at 1279.[6]

The court of appeals was apparently unimpressed by Mr. Lozano's argument for rehearing based on the

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[5] We have restated Mr. Lozano's applicable points of error on motion for rehearing in the court of appeals in Appendix I ["App. I"]. For the assertion of the Liepelt rule and the due process point, see rehearing points of error two and three respectively. [App. I at 40a-41a].

[6] The court of appeals' decision to continue to rely on state procedural rules despite contrary, controlling federal precedent, was also in conflict with an opinion of the Court of Appeals for the Second Judicial District Court of Texas in Fort Worth which had held, in cases involving jury charge error under the FELA, that federal law, not state law, would determine the procedural course and substantive outcome of the appeal in the state appellate court. See Dickson v. Burlington Northern R.R., 730 S.W.2d 82, 84 (Tex.App.--Fort Worth 1987, writ ref'd n.r.e.).

controlling federal standard because it denied Mr. Lozano's motion for rehearing without comment. [App. C].

Mr. Lozano filed a timely application for writ of error in the Supreme Court of Texas for further, discretionary review of the court of appeals' opinion. Mr. Lozano once again raised the conflict between the court of appeals' opinion and controlling substantive federal law providing that reversible error in regard to a trial court's refusal to issue a mandatory FELA instruction was to be had as a matter of law, not a weighing of the evidence of the state harmless error rule. See Liepelt, 444 U.S. at 492-8; Hamrock, 501 N.E. 2d at 1278-80. We have included Mr. Lozano's pertinent points of error on application for writ of error as Appendix J ["App. J"].[7] The supreme court denied Mr. Lozano's application for writ of error, without comment. [App. D].

Mr. Lozano subsequently sought rehearing of the supreme court's denial of its application for writ of error.[8]

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[7] For Mr. Lozano's points of error concerning the Liepelt rule and his assertion of a denial of the substantive due process right to the instruction under the FELA, see Mr. Lozano's second, third and fourth points of error in the supreme court. [App. J at 42a-43a].

[8] Rule 190 of the Texas Rules of Appellate Procedure at the time provided Mr. Lozano with a right to move for rehearing in the supreme court.

The supreme court denied Mr. Lozano's request on September 4, 1997. [App. E].

Reasons for Granting Mr. Lozano's Writ

The Supreme Court should grant Mr. Lozano's writ because the court of appeals' opinion squarely conflicts with the controlling Supreme Court precedent in Liepelt which provides that Mr. Lozano had a substantive federal right to the instruction in question and the remedy of determination as a matter of federal law that the Texas state court committed reversible error without more in refusing to give the instruction. Id., 444 U.S. 498-9. Because Mr. Lozano was guaranteed his right to the FELA instruction under federal law, we have argued that the court of appeals' denial of that right, through its failure to review the trial court's refusal to give the instruction as matter of law under Liepelt, constituted a denial of substantive due process to Mr. Lozano guaranteed by the Fourteenth Amendment to the Constitution.

The only distinction between this case and Liepelt is which mandatory FELA instruction was at issue. In Liepelt, it was the instruction on the nontaxability of the jury's award; here, it is the prohibition of the doctrine of assumption of the risk. Where this case and Liepelt share common ground is the heart of the supreme court's holding in Liepelt; that is: a state trial court's refusal to give a mandatory FELA instruction is determined on appeal in the state appellate system by federal appellate standard, and not by an alternative, contradictory state standard, the application of which effectively denied the petitioner its right to the remedy of an FELA instruction guaranteed by federal law. Id., 444 U.S. 492-3. To this end, Mr. Lozano's prayer for grant of a writ falls plainly within the four corners of the

Supreme Court's certiorari jurisdiction. See Supreme Court Rule 10(c).[9]

Mr. Lozano's petition is meritorious in two respects. First, the Supreme Court has not specifically addressed a litigant's right in state court to the FELA instruction concerning assumption of the risk. The extension of Liepelt to cases of state trial court error in refusing to give the instruction here is beyond question; where, as here, federal law has determined that a litigant has a right to an FELA instruction, it must be protected as a matter of federal law.

Secondly, the court appeals' opinion plainly conflicts with the bright-line rule concerning the federal standard of determination of reversible error as a matter of law on appeal enunciated by Liepelt. To call the court of appeals' opinion a matter of conflict with Liepelt is perhaps an understatement; it might better be described as a collision. Because the court of appeals has turned a blind eye to the applicability of controlling federal law as to the standard of

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[9] Rule 10(c) provides that the character of the reasons considered by the Supreme Court in granting writ include:

> **(c)** A state court . . . has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Ibid.

review on appeal in this case, it not only conflicts with Liepelt but also with the Supreme Court's subsequent opinion in Monessen Southwestern R. Co. v. Morgan which instructed the state courts that "state courts are required to apply federal substantive law in adjudicating FELA claims." Id., 486 U.S. 330, 335 (1988); accord Dickson, 730 S.W.2d at 84 ("[a]ppellate review of a jury verdict in an FELA case is governed by federal law [citation omitted].").

Nor is there any question Liepelt inherently rejected the concept that a state trial court's refusal to give an FELA-mandated instruction could somehow be determined on the basis of a discretionary, state harmless error standard because Liepelt's per se rule of error precludes any resort to a harmless error standard. See and compare O'Byrne v. St. Louis Southwestern R. Co., 632 F.2d 1285, 1286 (5th Cir. 1980) (holding that Liepelt rejected harmless error analysis in favor of a per se error analysis as a matter of law).

The paramount nature of the public policy concern here is beyond question. Section 54 of the FELA specifically prohibits any application of the assumption of the risk doctrine in an FELA case:

> In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injury to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in

> whole or in part from the negligence of any of the officers, agents or employees of such carrier. . . .

Ibid. [For §54, see App. F]. As the Supreme Court has explained: "[E]very vestige of the doctrine of the assumption of the risk was obliterated from the law by the 1939 amendment [creating §54 of the FELA]." Tiller v. Atlantic Coastline Railroad, 318 U.S. 54, 58 (1943). The rule creating the mandatory FELA instruction on assumption of the risk is the plainly intended remedy to ensure that the doctrine of assumption of the risk will have no play whatsoever in FELA cases involving contributory negligence under the circumstances presented here. See Fashauer, 57 F.3d at 1975; Jenkins, 22 F.3d at 212; Hamrock, 501 N.E. 2d at 1279-80.

Where, as here, the Texas state court refused to give a mandatory FELA instruction, though required to do so by federal law, the court of appeals could not simply ignore controlling federal law choosing instead to consider the issue as one raised under state procedural rules thereby avoiding the application of controlling federal law. Rather, the court of appeals was bound to determine the question of error as a matter of federal law under Liepelt on the record before it and then determine that the Texas state court committed reversible error without more in refusing to give the instruction. See Liepelt, 444 U.S. at 498; Hamrock, 501 N.E. 2d at 1278-80.

Conclusion

There is good cause for the Supreme Court to grant Mr. Lozano's writ. The court of appeals' opinion as stated presents a cognizable basis for further review by the Supreme Court under its certiorari jurisdiction because the court of appeals' opinion is in direct conflict with controlling precedent of the Supreme Court and, further, because the action of the court of appeals in refusing to apply the controlling federal standard has denied Mr. Lozano a substantive federal right the nature of which requires affirmative redress by the Supreme Court.

Respectfully submitted,

A. Glenn Diddel III
Counsel of Record
THE DIDDEL LAW FIRM
1640 Mellie Esperson Building
815 Walker
Houston, Texas 77002
(713) 237-1000
(713) 237-1006 (Fax)

Timothy J. Falcon
THE FALCON LAW FIRM
5044 Lapalco Boulevard
Marrero, Louisianna 70072
(504) 341-1234

ATTORNEYS FOR PETITIONER

APPENDIX

Appendix A

No. 93-14480

CONRADO LOZANO, Plaintiff
V.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant

In the 152nd Judicial District Court
of Harris County, Texas

FINAL JUDGMENT

BE IT REMEMBERED that on the 21st day of March, 1995, came on to be heard the above cause, whereupon came Plaintiff, CONRADO LOZANO, in person and by his attorney of record, and came the Defendant, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY and all the parties properly before the Court in this cause having announced ready for trial, a jury was thereon duly empaneled and sworn; the evidence was

presented and concluded; and following submission of the Court's final charge and arguments of counsel, the Jury reached its verdict which was returned in open Court and duly received and Ordered filed by the Court without objection by counsel.

The Jury answered the following stated questions:

Question No. 1:

Was the negligence, if any, of the persons named below a legal cause of the occurrence of September 11, 1991?

Answer "Yes" or "No" for each of the following:

A.	The Atchison, Topeka and Santa Fe Railway Company	Yes
B.	Conrado Lozano	Yes

APPENDIX A

Question No. 2:

What percentage of negligence that was a legal cause of the occurrence of September 11, 1991, is attributable to each of the parties?

A.	The Atchison, Topeka and Santa Fe Railway Company	40%
B.	Conrado Lozano	60%

Question No. 3:

What sum of money, if paid now in cash, would fairly and reasonably compensate Conrado Lozano for his injuries, if any, which you find resulted from the occurrence of September 11, 1991?

Consider the elements of damage listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not include interest on any amount of damages you find.

Do not include any amount for any condition not resulting from the occurrence in question. Do not include any amount for any condition existing before the occurrence in question, except to the extent, if any, that such other

condition was aggravated by any injuries that resulted from the occurrence in question.

a. Loss of earning capacity;
b. Physical pain;
c. Mental anguish;
d. Physical impairment.

You are instructed that the Congress of the United States has decided not to tax as income the amount of damages you award. Therefore, you should not consider such taxes in fixing the amount of your award, if any.

Do not reduce the amounts, if any, in your answers because of the negligence, if any, if Conrado Lozano.

Answer in dollars and cents for damages, if any, that were sustained in the past and that in reasonable probability will be sustained in the future.

Answer: $129,000

APPENDIX A

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate conrado Lozano for the reasonable expenses of necessary medical care resulting from the September 11, 1991, occurrence that in reasonable probability will be sustained in the future?

Answer: $15,000

And having so answered the questions, returned their verdict.

And it appearing to the Court that in compliance with said verdict of the jury and under said verdict, CONRADO LOZANO should have Judgment entered in its favor, it is, therefore:

ORDERED, ADJUDGED and DECREED that Plaintiff, CONRADO LOZANO, have and recover from Defendant, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, the sum of $37,013.86, ($57,600 less $20,586.14) (Advancements - $8,600.00; RRB lien - $3,432.14; BTL benefits - $8,554.00). Costs shall be taxed

against Defendant. All relief not expressly granted herein is denied.

SIGNED on this, the 27th day of April, 1995.

/s/ Judge Harriet O'Neill,
Judge Presiding

APPROVED AS TO FORM:

JONES & GRANGER
/s/ David Q. Haag
TBA# 08657600
10000 Memorial Drive, Suite 888
P. O. Box 4340
Houston, Texas 77210
Telephone: (713) 668-0230
FAX: (713) 956-7139

Attorney for Plaintiff.

McLEOD, ALEXANDER, POWEL & APFFEL, P.C.
/s/ Douglas W. Poole
TBA# 16115600
802 Rosenberg
P. O. Box 629
Galveston, Texas 77553
Telephone: (409) 763-2481
FAX: (409) 762-1155

Attorney for Defendant.

APPENDIX B

COURT OF APPEALS

FIRST DISTRICT OF TEXAS

COPY OF JUDGMENT

NO. 01-95-00912-CV

CONRADO LOZANO, APPELLANT
V.
ATCHISON, TOPEKA & SANTA FE
RAILWAY CO., APPELLEE

Appealed from the 152nd District Court
of Harris County, Texas (Tr. Ct. No. 93-144808).
Opinion delivered by Justice O'Connor,
Justices Hutson-Dunn and Taft also sitting.

The cause heard today by the Court is an appeal from the judgment rendered and entered by the court below on April 27, 1995. After hearing the cause on the record of the court below and inspecting the same, it is the opinion of this Court that there was no error in the judgment. It is therefore **CONSIDERED, ADJUDGED, AND ORDERED** that the judgment of the court below be in all things **affirmed**.

APPENDIX B

It is further **ORDERED** that the appellant, CONRADO LOZANO, pay all costs incurred by reason of this appeal.

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Hutson-Dunn, O'Connor, and Taft.

Judgment entered August 15, 1996

APPENDIX B

Judgment affirmed and Opinion filed August 15, 1996

IN THE
COURT OF APPEALS
FOR THE
FIRST DISTRICT OF TEXAS

NO. 01-95-00912-CV

CONRADO LOZANO, Appellant
V.
ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY, Appellee

On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Cause No. 93-144808

OPINION

This is an appeal of a case tried under the Federal Employer's Liability Act ("FELA"). See 45 U.S.C. §§51-60 (1986). The appellant, Conrado Lozano, raises three points

of error and asserts this case should be reversed and remanded for a new trial. Lozano contends the trial court erred in refusing a requested jury instruction, and the jury changed its verdict after considering inadmissible portions of exhibits that were poorly redacted. We affirm.

A.
Summary of Facts

On September 11, 1991, Lozano's foreman, Mark Powell, assigned Lozano the job of bending a rail with two other men. Lozano was injured when the rail bending machine that he was using slipped and knocked him to the ground. Lozano sued the appellee, the Atchison, Topeka & Santa Fe Railway Company (Santa Fe). Lozano alleged Santa Fe was negligent in not providing a safe workplace and safe tools, and Santa Fe's negligence caused Lozano's injuries.

The case was tried to a jury. The jury found both Lozano and Santa Fe were negligent and assigned 60 percent fault of the fault to Lozano and 40 percent to Santa Fe. The trial court made the appropriate reductions to the damage award and rendered judgment. Lozano appeals this judgment.

APPENDIX B

B.
Assumption of the Risk Instruction

In point of error one, Lozano contends the trial court erred in refusing to submit his requested instruction in the jury charge. During the charge conference, Lozano made a written request to the court to submit the following instruction; "If the employee protests, but then performs the commanded task, the risk of injury does not shift to him." The trial court refused the instruction.

Lozano contends his requested instruction was necessary for two reasons. First, he argues that both the evidence at trial and Santa Fe's opening statements and closing arguments raised the issue of assumption of the risk. assumption of the risk is not a defense under FELA. 45 U.S.C. §54 (1986); Consolidated Rail Corp. v. Gottshall, 114 S.Ct. 2396, 2404 (1994). Second, he contends his requested instruction was necessary because the evidence showed he was injured while carrying out a direct order of his employer. See Jenkins v. Union Pac. R.R. Co., 22 F.3d 206, 211 (9th Cir. 1994) (when an employee carries out direct order, even if he has reason to know order exposes him to danger, his conduct is assumption of risk rather than contributory negligence). Lozano contends his instruction was necessary to eliminate any possibility that the jury might reduce its award based on assumption of the risk. Lozano argues he had a substantive federal right under FELA to have

the requested instruction submitted in the court's charge. Lozano asserts the trial court's refusal to give the requested instruction was reversible error.

Santa Fe responds by arguing five reasons this Court should overrule point of error one. First, Santa Fe argues Lozano waived all points of error by producing a partial statement of facts. The statement of facts before this Court does not contain Lozano's opening statement or closing arguments, nor does it contain the testimony of six of the 14 trial witnesses. Second, Santa Fe contends Texas law governs a trial court's decision whether to submit a jury instruction in a FELA case tried in state court. Third, Santa Fe contends Lozano's assumption of the risk instruction was unnecessary because assumption of the risk was not raised in the trial of this case. Fourth, even if an assumption of the risk instruction was necessary, Santa Fe claims Lozano waived his point of error because his requested instruction was confusing and not substantially correct. Fifth, Santa Fe claims any error in refusing the assumption of the risk instruction was harmless.

We cannot consider point of error one on the merits. Assuming without deciding that the trial court erred in refusing Lozano's requested instruction, Lozano had not brought a sufficient record before this Court to show that the error harmed him.

APPENDIX B

Rule 81(b)(1)provides:

> No judgment shall be reversed on appeal and a new trial ordered . . . on the ground that the trial court has committed an error . . . in the course of the trial, unless the appellate court shall be of the opinion that the error . . . amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case.

Tex.R.App.P. 81(b)(1). Jury charge error is reversible only if, in light of the totality of the circumstances, it probably caused the rendition of an improper judgment against the complaining party. Island Rec. Dev. Corp. v. Republic of Tex. Sav. Ass'n, 710 S.W.2d 551, 555 (Tex. 1986); St. James Transp. Co. v. Porter, 840 S.W.2d 658, 664 (Tex.App.-- Houston [1st Dist.] 1992, writ denied). To determine whether an error in the jury charge is reversible, we must consider the entire record. Reinhart v. Young, 906 S.W.2d 471, 473 (Tex. 1995) (plurality opinion).

Specifically, we consider the pleadings of the parties, the evidence presented at trial, and the charge in its entirety. Island Rec. Dev. Corp., 710 S.W.2d at 555.

APPENDIX B

Lozano did not file proposed points of error, as required by Tex.R.App.P. 53(d). In Christiansen v. Prezelski, 782 S.W.2d 842, 843 (Tex. 1990), the Supreme Court said:

> A reviewing court must examine the entire record in a case in order to determine whether an error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. When an appellant has neither complied with rule 53(d) nor filed a complete statement of facts, the reviewing court is unable to ascertain whether a particular ruling by the trial court is harmful in the context of the entire case.

The Supreme Court has required a complete statement of facts to do a harmless error analysis. Although the statement of facts included the testimony of all eyewitnesses to the railroad accident, significant portions of the statement o facts are missing. Therefore, we cannot tell whether the trial court's ruling harmed Lozano in the context of the entire case.

We overrule point of error one.

C.

Jury Consideration of Inadmissible Evidence

Points of error two and three relate to the jury's consideration of portions of trial exhibits that were ruled inadmissible but redacted in such a way that the jurors could still read the material that had been ruled inadmissible. In point of error two, Lozano contends the trial court erroneously denied his motion for new trial after the court and both parties learned of an improper communication to the jury that caused the jury to reduce its award to Lozano. In point of error three, Lozano contends the trial court erroneously denied his motion for new trial because the jury engaged in misconduct that injured Lozano.

Santa Fe responds to points of error two and three with four arguments. First, Santa Fe contends Lozano waived all points of error by producing a partial statement of facts. Second, Santa Fe argues Lozano waived points of error two and three by participating in the redaction and by not objecting before the redacted exhibits were sent to the jury. Third, Santa Fe argues there is no competent evidence of jury misconduct, outside influence, or improper communication to the jury. Fourth, Santa Fe argues that any error surrounding the jury's reading of the redacted material was harmless.

APPENDIX B

We cannot consider points of error two and three on the merits because Lozano has not brought forward a sufficient record to support reversal based on these points of error. The parties dispute who had the burden to ensure the exhibits were redacted properly. We do not have a statement of facts from the hearing in which the parties and trial court agreed how redaction would be accomplished. In the absence of such a statement of facts, we overrule points of error two and three or lack of a sufficient record. an appellant must either comply with rule 53(d) or file a complete statement of acts; otherwise, it will be presumed that the omitted portions of the record are relevant to the disposition of the appeal. Christiansen, 782 S.W.2d at 843. Here, the missing portion of the record is so critical to appellate review of points two and three that it is arguably unnecessary to apply the presumption from Christiansen. With or without the presumption, the record is insufficient to review the appellant's points of error.

We overrule points of error two and three.

We affirm the judgment of the trial court.

/s/ Michol O'Connor
MICHOL O'CONNOR
Justice

APPENDIX B

Justices Hutson-Dunn and Taft also sitting.

Do Not Publish. Tex.R.App.P. 90.

Judgment rendered and opinion delivered August 15, 1996.
True Copy Attest:

/s/ Margie Thompson
Clerk of Court

APPENDIX C

COURT OF APPEALS
First District
1307 San Jacinto, 10th Floor
Houston, Texas 77002

January 27, 1997

David Q. Haag
Jones & Granger
10,000 Memorial Drive, Suite 888
Houston, Texas 77210

Christopher Tramonte
The Diddel Law Firm
1640 Mellie Esperson Bldg.
815 Walker
Houston, Texas 77002

Kenneth J. Bower
McLeod, Alexander, Powell & Apffel
802 Rosenberg
P. O. Box 629
Galveston, Texas 77553

Mark T. Berry
10000 Memorial Drive, Suite 888
Houston, Texas 77210

APPENDIX C

A. Glenn Diddel, III
815 Walker, Suite 1640
Houston, Texas 77002

Douglas W. Poole
McLeod, Alexander, Powell & Apffel
802 Rosenberg
P. O. Box 629
Galveston, Texas 77553

RE: Court of Appeals Number: 01-95-00912-CV
Trial Court Case Number: 93-14480

Style: Lozano, Conrado
v.
Topeka, Atchison and Santa Fe Railway Company

Dear Counsel:

On this day came on to be considered the Appellant's(s) motion for rehearing. And such motion is hereby OVERRULED.

Respectfully yours,
Margie Thompson, Clerk

By: Joann Aguirre, Deputy

APPENDIX C

COURT OF APPEALS
First District
1307 San Jacinto, 10th Floor
Houston, Texas 77002

January 27, 1997

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Galveston, Texas 77553

Mark T. Berry
10000 Memorial Drive, Suite 888
Houston, Texas 77210

APPENDIX C

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Houston, Texas 77002

Douglas W. Poole
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802 Rosenberg
P. O. Box 629
Galveston, Texas 77553

RE: Court of Appeals Number: 01-95-00912-CV
Trial Court Case Number: 93-14480

Style: Lozano, Conrado
v.
Topeka, Atchison and Santa Fe Railway Company

Dear Counsel:

Appellant's motion for rehearing en banc is DENIED.

Respectfully yours,
Margie Thompson, Clerk

By: Joann Aguirre, Deputy

APPENDIX D

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Austin, Texas 78711

June 12, 1997

Mr. A. Glenn Diddel, III
815 Walker, Suite 1640
Houston, Texas 77002

Mr. Justin Joseph Presnal
Presnal Law Firm
607 6th Street North
Texas City, Texas 77590

Mr. Christopher Tramonte
The Diddel Law Firm
1640 Mellie Esperson Bldg.
815 Walker
Houston, Texas 77002

Mr. Kenneth J. Bower
McLeod, Alexander, Powell & Apffel
802 Rosenberg
P. O. Box 629
Galveston, Texas 77553

APPENDIX D

Mr. David Q. Haag
Jones & Granger
10,000 Memorial Drive, Suite 888
Houston, Texas 77210

Mr. Mark T. Berry
10000 Memorial Drive, Suite 888
Houston, Texas 77210

Mr. Douglas W. Poole
McLeod, Alexander, Powell & Apffel
802 Rosenberg
P. O. Box 629
Galveston, Texas 77553

RE: Case Number 97-0167
Style: CONRADO LOZANO v. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied".

Sincerely,
John T. Adams, Clerk
/s/ Michael Kopp, Deputy

APPENDIX E

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Austin, Texas 78711

September 4, 1997

Mr. A. Glenn Diddel, III
815 Walker, Suite 1640
Houston, Texas 77002

Mr. Justin Joseph Presnal
Presnal Law Firm
607 6th Street North
Texas City, Texas 77590

Mr. Christopher Tramonte
The Diddel Law Firm
1640 Mellie Esperson Bldg.
815 Walker
Houston, Texas 77002

Mr. Kenneth J. Bower
McLeod, Alexander, Powell & Apffel
802 Rosenberg
P. O. Box 629
Galveston, Texas 77553

APPENDIX E

Mr. David Q. Haag
Jones & Granger
10,000 Memorial Drive, Suite 888
Houston, Texas 77210

Mr. Mark T. Berry
10000 Memorial Drive, Suite 888
Houston, Texas 77210

Mr. Douglas W. Poole
McLeod, Alexander, Powell & Apffel
802 Rosenberg
P. O. Box 629
Galveston, Texas 77553

RE: Case Number 97-0167
Style: CONRADO LOZANO v. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above-styled case.

Sincerely,
John T. Adams, Clerk
/s/ Blanca E. Morin, Deputy

APPENDIX F

Pertinent sections of the FELA, 45 U.S.C. §§51, 53, 54 and 56

§51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States of Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

APPENDIX F

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

§53. Contributory negligence; diminution of damages

In all actions on and after april 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier or any statute enacted for the safety of employees contributed to the injury or death of such employee.

APPENDIX F

§54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§56. Actions; limitations; concurrent jurisdictions of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

APPENDIX G

Instruction No. _____

If the employee protests, but then performs the commanded task, the risk of injury does not shift to him.

/s/ "3/29/95
Refused
Harriet O'Neill"
Judge Presiding

APPENDIX H

CAUSE No. 93-14480

CONRADO LOZANO, Plaintiff
V.
ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, Defendants

In the 152nd Judicial District Court
of Harris County, Texas

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have been previously given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers consider only the evidence introduced here under oath and such exhibits, ~~if any~~, as have been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations you will not consider or

discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss or concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority of any other vote of less than 10 jurors. If the verdict and all the answers therein are reached by unanimous agreement, the Presiding Juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

APPENDIX H

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense which varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other definition or any other meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No."

The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case.

Whenever a question requires other than a "yes" or "No" answer, your answer must be based on a preponderance of the evidence.

APPENDIX H

Definitions and Instructions

"Negligence" is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstance.

For purposes of this action, negligence is a "legal cause" of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage.

Question No. 1

Was the negligence, if any, of the persons named below a legal cause of the occurrence of September 11, 1991?

Answer "Yes" or "No" for each of the following:

A. The Atchison, Topeka & Santa Fe Railway Company Yes

B. Conrado Lozano Yes

If, in answer to Question No. 1, you have found that the negligence of more than one of the parties was a legal cause of the injury, then answer Question No. 2. Otherwise, do not answer Question No. 2.

APPENDIX H

Question No. 2

What percentage of negligence that was a legal cause of the occurrence of September 11, 1991, is attributable to each of the parties?

Answer by stating the percentage, if any, opposite each name. The percentages you find must total 100 percent. The negligence attributable to a person named below is not necessarily measured by the number of acts or omissions found.

A.	The Atchison, Topeka & Santa Fe Railway Company	40%
B.	Conrado Lozano	60%
	TOTAL PERCENT	100%

APPENDIX H

If, in answer to Question No. 1, you have answered "yes" for The Atchison, Topeka & Santa Fe Railway Company, then answer the following question. Otherwise, do not answer the following question.

Question No. 3

What sum of money, if paid now in cash, would fairly and reasonably compensate Conrado Lozano for his injuries, if any, which you find resulted from the occurrence of September 11, 1991?

Consider the elements of damage listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not include interest on any amount of damages you find.

Do not include any amount for any condition not resulting from the occurrence in question. Do not include any amount for any condition existing before the occurrence in question, except to the extent, if any, that such other condition was aggravated by any injuries that resulted from the occurrence in question.

a. Loss of earning capacity;
b. Physical pain;
c. Mental anguish;
d. Physical impairment.

APPENDIX H

You are instructed that the Congress of the United States has decided not to tax as income the amount of damages you award. Therefore, you should not consider such taxes in fixing the amount of your award, if any.

Do not reduce the amounts, if any, in your answers because of the negligence, if any, if Conrado Lozano.

Answer in dollars and cents for damages, if any, that were sustained in the past and that in reasonable probability will be sustained in the future.

Answer: $129,000

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate conrado Lozano for the reasonable expenses of necessary medical care resulting from the September 11, 1991, occurrence that in reasonable probability will be sustained in the future?

Answer: $15,000

APPENDIX H

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror--

1. to preside during your deliberations.
2. to see that your deliberations are conducted in an orderly manner and in accordance wit the instructions in this charge,
3. to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge,
4. to vote on the questions,
5. to write you answers to the questions in the spaces provided, and
6. to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

APPENDIX H

When you have answered all the questions you are required to answer under the instructions of the judge, and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

/s/ Harriet O'Neill
Judge Presiding

APPENDIX H

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herèwith return same into court as our verdict.

(To be signed by the presiding juror if unanimous.)

/s/ Presiding Juror

(To be signed by those rendering the verdict if not unanimous.)

/s/ 10 jurors

APPENDIX I

No. 01-95-00912-CV

COURT O APPEALS
FIRST JUDICIAL DISTRICT OF TEXAS
HOUSTON, TEXAS

CONRADO LOZANO, Appellant,
V.
ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, Appellee.

REHEARING POINT OF ERROR TWO

THE PANEL, BASING ITS DECISION NOT TO REACH THE MERITS OF MR. LOZANO'S FIRST POINT OF ERROR ON STATE PROCEDURAL RULES, ERRED BECAUSE FEDERAL LAW, NOT STATE PROCEDURAL LAW, CONTROLS STATE APPELLATE REVIEW AND REMEDIES IN APPEALS INVOLVING A TRIAL COURT'S FAILURE TO GIVE AN FELA JURY INSTRUCTION IN AN FELA CASE. NORFOLK & W. RY. CO. V. LIEPELT, 444 U.S. 490, 492-3 (1980). UNDER FEDERAL LAW, MR. LOZANO HAD PRESERVED AN ADEQUATE RECORD ON APPEAL TO ENTITLE HIM, AS A MATTER OF LAW, TO THE FEDERAL REMEDY OF REVERSAL OF THE TRIAL COURT'S JUDGMENT AND REMAND OF THE CASE OR A NEW TRIAL. LIEPELT, 444 .S. AT 498. [Panel op. at 3-4].

APPENDIX I

No. 01-95-00912-CV

COURT O APPEALS
FIRST JUDICIAL DISTRICT OF TEXAS
HOUSTON, TEXAS

CONRADO LOZANO, Appellant,
V.
ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, Appellee.

REHEARING POINT OF ERROR THREE

MOREOVER, THE PANEL'S ERROR IN NOT REACHING MR. LOZANO'S FIRST POINT AND BY DOING SO NOT DECIDING THE POINT AND, IN ACCORDANCE WITH CONTROLLING FEDERAL LAW, REMANDING THE CASE FOR A NEW TRIAL WITHOUT MORE CONSTITUTE FUNDAMENTAL ERROR. IN THIS REGARD, MR. LOZANO'S SUBSTANTIVE DUE PROCESS RIGHTS UNDER THE FELA INCLUDED THE SUBSTANTIVE FEDERAL REMEDY OF A REVERSAL OF TRIAL COURT'S JUDGMENT AND THE GRANTING OF A NEW TRIAL AS A MATTER OF LAW WHERE, AS HERE, THE TRIAL COURT FAILED TO INCLUDE AN INSTRUCTION IN THE CHARGE REQUIRED UNDER THE FELA. IBID.; SEE DUTTON V. SOUTHERN PAC. TRANSP., 576 S.W.2d 782, 785-76 (TEX. 1978). [Panel op. at 3-4].

APPENDIX J

NO. _____

IN THE SUPREME COURT OF TEXAS

CONRADO LOZANO, Petitioner,
V.
ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, Respondent.

POINT OF ERROR TWO

THE COURT OF APPEALS ERRED IN DETERMINING IT COULD NOT REACH THE MERITS OF MR. LOZANO'S FIRST POINT OF ERROR CONCERNING THE TRIAL COURT'S FAILURE TO GIVE A MANDATORY FELA INSTRUCTION ON THE BASIS OF STATE APPELLATE PROCEDURAL RULES. UNDER THE FELA, FEDERAL APPELLATE REVIEW STANDARDS, NOT STATE APPELLATE REVIEW STANDARDS, CONTROL HERE AND REQUIRED DETERMINATION OF HE QUESTION PRESENTED AS A MATTER OF LAW IN MR. LOZANO'S FAVOR. NORFOLK & W. RY. CO. V. LIEPELT, 444 U.S. 490, 492-3 (1980). [C.A. Op. at 3-4].

APPENDIX J

NO. _____

IN THE SUPREME COURT OF TEXAS

CONRADO LOZANO, Petitioner,
V.
ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, Respondent.

POINT OF ERROR THREE

THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN NOT GRANTING MR. LOZANO'S FIRST POINT OF ERROR, BECAUSE UNDER THE FELA AND THE CONTROLLING FEDERAL APPELLATE STANDARD, MR. LOZANO HAD PRESERVED AN ADEQUATE RECORD ON APPEAL TO ENTITLE HIM, AS A MATTER O LAW, TO REVERSAL OF THE TRIAL COURT'S JUDGMENT AND REMAND OF THE CASE OR A NEW TRIAL. LIEPELT, 444 U.S. AT 498. [C.A. Op. at 3-4].

APPENDIX J

NO. _____

IN THE SUPREME COURT OF TEXAS

CONRADO LOZANO, Petitioner,
V.
ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, Respondent.

POINT OF ERROR FOUR

THE COURT OF APPEALS' ERROR IN NOT REACHING AND DECIDING MR. LOZANO'S FIRST POINT OF ERROR AS A MATTER OF LAW IN MR. LOZANO'S FAVOR UNDER THE FELA CONSTITUTED FUNDAMENTAL ERROR. IN THIS REGARD, MR. LOZANO'S SUBSTANTIVE DUE PROCESS RIGHTS UNDER THE FELA INCLUDED THE SUBSTANTIVE FEDERAL REMEDY OF A REVERSAL OF THE TRIAL COURT'S JUDGMENT AND THE GRANTING OF A NEW TRIAL AS A MATTER OF LAW WHERE, AS HERE, THE TRIAL COURT REFUSED TO INCLUDE AN INSTRUCTION IN THE CHARGE REQUIRED UNDER THE FELA. LIEPELT, 444 U.S. AT 298; SEE MITCHELL V. MISSOURI-KANSAS-TEXAS R. CO., 786 S.W.2d 659, 663 (TEX. 1990) (TRIAL COURT'S USE OF INSTRUCTION IN VIOLATION OF FELA REQUIREMENTS CONSTITUTED REVERSIBLE ERROR); DUTTON V. SOUTHERN PAC. TRANSP., 576 S.W.2d 782, 785-6 (TEX. 1978) (SAME). [C.A. Op. at 3-4].

Supreme Court, U.S.
FILED
JAN 7 1998
CLERK

NO. 97-943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CONRADO LOZANO,
Petitioner,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Respondent

On Petition For Writ Of Certiorari To The
Court Of Appeals For The First Judicial District Of Texas

BRIEF IN OPPOSITION

KENNETH J. BOWER
(Counsel of Record)
DOUGLAS W. POOLE
McLeod, Alexander, Powel &
Apffel, P.C.
802 Rosenberg; P.O. Box 629
Galveston, Texas 77553
409-763-2481

Attorneys for Respondent

A Law Brief Co. • 6605 McGrew • Houston, Texas 77087 • (713) 981-9000

QUESTIONS PRESENTED

1. Did the court of appeals properly overrule Lozano's complaint about the refused "assumption of the risk" instruction, given that the instruction was unnecessary, confusing and not substantially correct?

2. Did the court of appeal properly overrule Lozano's complaint about the refused "assumption of the risk" instruction, given that any error in refusing the instruction was harmless?

3. Did the court of appeals properly find the partial appellate record insufficient to prove that refusing the "assumption of the risk" instruction was harmful, given that significant parts of the statement of facts were omitted, including the testimony of Lozano's sole liability expert and Santa Fe's entire case-in-chief?

RULE 29.6 STATEMENT

The Burlington Northern and Santa Fe Railway Company ("BNSF") is the successor in interest to The Atchison, Topeka and Santa Fe Railway Company. Santa Fe Pacific Corporation owns all of BNSF's stock. BNSF's nonwholly owned subsidiaries are Alameda Belt Line, The Belt Railway Company of Chicago, Carnas Prairie Railroad Company, Central California Traction Company, Houston Belt & Terminal Railway Company, Iowa Transfer Railway Company, Kansas City Terminal Railway Company, Longview Switching Company, Metrovias S.A., M T Properties, Inc., The Oakland Terminal Railway, Paducah & Illinois Railroad Company, Portland Terminal Railroad Company, St. Joseph Terminal Railroad Company, Sunset Railway Company, Terminal Railroad Association of St. Louis, Texas City Terminal Railway Company, Trenes de Buenos Aires S.A., TTX Company, and The Wichita Union Terminal Railway Company.

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NO. 97-943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CONRADO LOZANO,
Petitioner,

V.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Respondent.

On Petition For Writ Of Certiorari To The
Court Of Appeals For The First Judicial District Of Texas

BRIEF IN OPPOSITION

Respondent The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") respectfully submits this brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

A. Disposition Below

Lozano sued Santa Fe for negligence under the Federal Employers' Liability Act, alleging he hurt himself using a jack to bend a rail. Based on the jury's verdict (Lozano 60% negligent, Santa Fe 40% negligent), the trial court awarded Lozano $37,013.86. Nevertheless, Lozano moved for a new trial, claiming the trial court erred in refusing to instruct the jury on assumption of the risk. The motion was denied, and the court of appeals affirmed, issuing a "do not publish" opinion. The Texas Supreme Court denied Lozano's application for writ of error.

B. Statement Of Facts

1. Introduction: Deficiencies In The Record

Lozano claims the trial court erred in refusing to submit an "assumption of the risk" instruction. But as the court of appeals properly concluded, Lozano failed to obtain an adequate record for appeal. Specifically, the record omits the entire testimony of six of the 14 witnesses at trial, including Santa Fe's entire case-in-chief and Lozano's sole liability expert. Lozano's opening statement and closing argument are also omitted. (Tr. 128). What is omitted proves there was no need to instruct the jury on assumption of the risk; further, that failure to do so was harmless.

2. The Rail Bender And Lozano's Accident

As a Santa Fe trackman, Lozano's duties included replacing damaged track. (S/F Vol. II, 212-213). Because the rails in stock were straight, they had to be bent to replace curved track. (S/F Vol. I-A, 45-46, 51-53, 104, 114-117; Vol. II, 172-173). To bend rails, Lozano and others used a "rail bender", which is a jack similar to what we use to change automobile tires. (S/F Vol. I-A, 45-46, 79-82). Railroads have always used rail benders to bend rails; yet no one at trial could recall anyone but Lozano being hurt while bending a rail. (S/F Vol. I-A, 105-106; Vol. II, 69, 123-124, 130, 174, 202). Evidently, Lozano was the first.

All agreed that rail benders present risks which require due care. For instance, during the jacking process, any jack will tend to ride up the rail. (S/F Vol. I-A, 23-24, 39-40; Vol. II, 166). When that happens, the proper procedure is to stop jacking and reset the jack; otherwise, it will come off the rail. (S/F Vol. I-A, 23-24; Vol. II, 11-12, 124, 133, 166). Also, one must maintain a proper stance and good balance while jacking. This means having both feet on the ground, with one foot forward and the other behind. (S/F Vol. I-A, 102-103, 108110, 142-143; Vol. II, 171, 174; Vol. III, 289, 301). As Lozano admitted, it would be dangerous to operate the jack with one foot on the jack and the other on the ground. (S/F Vol. III, 301).

In 1991, Lozano and co-worker Bell were using the rail bender. As they pulled down on the lever bar, the jack came off the rail. (S/F Vol. II, 137; Px 2, 3; Dx 9). Nothing happened to Bell, who was in the proper defensive position. But according to Lozano's post-accident statement, Lozano was caught off balance with one foot on the jack. (Dx 21; S/F Vol. I-A, 103). Accordingly, he fell and sprained his neck. (S/F Vol. I-A, 103-104; Dx 13). In short, Lozano fell because he carelessly failed to assume a balanced, defensive stance while jacking--a violation of Santa Fe's safety rule 3002, which mandates: "Tools must be used defensively so that slipping or unexpected movement will not cause loss of balance or injury." (Dx 7).

3. The Trial

Lozano sued Santa Fe for negligence under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51. (Tr. 2-6). He claimed the rail bender was defective because one of its parts was slightly bent; alternatively, that Santa Fe should have purchased pre-bent rails to eliminate the need for rail bending. (S/F Vol. I-A, 51-52, 69; Vol. II, 223).

Santa Fe responded that the bent part on the rail bender played no role in the accident; further, that purchasing pre-bent rails was

impractical. Lozano's own witnesses all but conceded these facts. (S/F Vol. I-A, 96-97, 105-106, 114-117, 121; Vol. II, 163, 165, 172-174). Santa Fe also showed that Lozano's accident resulted from his failure to use the rail bender in accord with common sense and company safety rules. (S/F Vol. I-A, 102-103, 108, 110, 142-143; Vol. II, 171; Dx 7, 21, 34). Some of the best evidence of Lozano's negligence and Santa Fe's innocence was the testimony of Don Fisher, which Lozano omitted from the record. (Tr. 128).

Throughout the trial, Santa Fe maintained that rail bending was safe if done properly; further, that the rail bender was not defective. For that reason, Santa Fe never suggested that Lozano was negligent in consenting to use the rail bender. Instead, Santa Fe contended only that Lozano failed to use the rail bender in a safe manner. The notion that Lozano "assumed the risk" was never injected in the case. This would be perfectly clear if the appellate record included Santa Fe's case-in-chief and Lozano's closing argument.

4. The Verdict And Judgment

The jury found Lozano 60% negligent and Santa Fe 40% negligent. (Tr. 78-81). The trial court reduced Lozano's damages accordingly, awarding him $37,013.86. (Tr. 88). Thereafter, Lozano moved for a new trial, alleging error in the jury charge. (Tr. 90-112). The motion was denied. (Tr. 120).

REASONS FOR DENYING WRIT

I. LOZANO'S "ASSUMPTION OF THE RISK" INSTRUCTION WAS PROPERLY REFUSED BECAUSE IT WAS UNNECESSARY, CONFUSING AND NOT SUBSTANTIALLY CORRECT

A. Introduction: Contributory Negligence And Assumption Of The Risk

At the charge conference, Lozano's counsel tendered the following

instruction, not indicating where it should be placed in the charge:

> If the employee protests, but then performs the commanded task, the risk of injury does not shift to him.

(S/F Vol. III, 325). The trial court refused the instruction. (S/F Vol. III, 326; Tr. 85).

On appeal, Lozano claimed the refusal to submit the instruction was reversible error. Santa Fe responded that 1) the instruction was unnecessary, 2) Lozano failed to tender a substantially correct instruction, and 3) Lozano failed to prove harm. The court of appeals embraced the third argument:

> Assuming without deciding that the trial court erred in refusing Lozano's requested instruction, Lozano has not brought a sufficient record before this Court to show that the error harmed him.

Slip. Op. at 3. All three arguments are discussed below. But first, a brief discussion of contributory negligence and assumption of the risk is in order.

The FELA employs a pure comparative-negligence scheme that reduces an employee's recovery by his share of negligence. 45 U.S.C. §§51,53; *Fashauer v. New Jersey Transit Rail Operations,* 57 F.3d 1269, 1274 (3rd Cir. 1995). In 1939, Congress abolished the "assumption of the risk" defense by amending the FELA to provide that plaintiffs "shall not be held to have assumed the risks of . . . employment" in cases where the railroad is negligent or violates a safety statute. 45 U.S.C. §54; *Fashauer*, 57 F.3d at 1274.

By virtue of the 1939 amendment, an FELA plaintiff's recovery

cannot be reduced simply because he "implicitly consented to the risk by accepting employment with the railroad or by performing a task in the manner which the employer directed." *Fashauer,* 57 F.3d at 1280. Accordingly, if an employee receives a task and chooses to perform it in a negligent manner, recovery may be reduced. *Fashauer,* 57 F.3d at 1280 (choosing unsafe method over safer alternative is contributory negligence, as is failure to follow safety rules). But if the employee was specifically ordered to use the negligent method, recovery may not be reduced. *Jenkins v. Union Pacific R. Co.,* 22 F.3d 206, 211(9th Cir. 1994).

In our case, Lozano was told to use the rail bender. But no one suggested that Lozano was wrong to use the rail bender. To the contrary, Santa Fe argued that the rail bender was safe if properly used; further, that no one but Lozano had been hurt while using it. (S/F Vol. I-A, 105-106; Vol. II, 69, 123-124, 130, 174, 202). The only complaint directed at Lozano was that his manner of using the rail bender (improper stance, one foot on the jack) was careless and violated company rules.[1] No one told him to use the rail bender in that manner. He simply chose an unsafe method over a safer alternative. Accordingly, no "assumption of the risk" instruction was required.

B. The Standard Of Review And Controlling Law

Tex. R. Civ. P. 277 requires the trial court to submit instructions that are "proper to enable the jury to render a verdict." Trial courts have wide latitude in this regard, and their decisions are reviewed for abuse of discretion. *Magro v. Ragsdale Bros. Inc.,* 721 S.W.2d 832, 836 (Tex. 1986). The test for abuse of discretion is whether the trial court acted arbitrarily, without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 241-242 (Tex. 1986), *cert. denied,* 476 U.S. 1159 (1986).

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[1]Lozano's post-accident statement admitted he had one foot on the jack. (Dx 21; S/F Vol. I-A, 103). At trial, he said that would be dangerous, but attributed his post-accident statement to a "ghost". (S/F Vol. III, 296, 301).

It is appellant's burden to present an appellate record that establishes abuse of discretion. Tex. R. App. P. 50(d). What is omitted from the record must be presumed to support the ruling. *Salley v. Houston Lighting & Power Co.,* 801 S.W.2d 230, 232 (Tex. App. - Houston [lst Dist.] 1990, no writ).

When FELA cases are tried in state court, state rules on "the form, necessity, and effect" of explanatory instructions apply if they do not interfere with a substantive FELA right or defense. *Scott v. Atchison, Topeka and Santa Fe Railway Co.,* 572 S.W.2d 273, 281 (Tex. 1978)(state law governed whether "act of God" instruction should follow definition of "negligence"); *Mitchell v. Missouri-Kansas-Texas R. Co.,* 786 S.W.2d 659, 661-662 (Tex. 1990)(state law governed propriety of "negligence" instruction that required proof of foreseeability).[2] According to *Scott* and *Mitchell,* the trial court's ruling must be reviewed under standards of state practice, not federal practice. But as shown below, the ruling was proper under any standard.

C. Lozano's "Assumption Of The Risk" Instruction Was Not Necessary

Texas law forbids explanatory instructions that are unnecessary or confusing. Tex. R. Civ. P. 277; *Acord v. General Motors Corp.,* 669 S.W.2d 111, 115-116 (Tex. 1984). Federal courts generally condemn "assumption of the risk" instructions as unnecessary and confusing. See *Clark v. Burlington Northern, Inc.,* 726 F.2d 448, 452 (8th Cir. 1984) (instruction "generally condemned"); *Casko v. Elgin, Joliet and Eastern Ry. Co.,* 361 F.2d 748, 751 (7th Cir. 1966) (no instruction if abolished defense "neither pleaded nor argued"); *Fashauer,* 57 F.3d at 1281 (no instruction unless abolished defense is argued).

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[2]See also, *St. Louis Southwestern Ry. Co. v. Marks*, 749 S.W.2d 911, 913-915 (Tex. App. - Texarkana 1988, writ den.) (propriety of explanatory instruction in FELA case governed by state law, which gives trial court broad discretion).

However, if an employee is blamed for performing a task in the manner that the employer specifically ordered, an "assumption of the risk" instruction may be needed to eliminate the danger of finding the employee negligent simply because he did what was specifically ordered. *Fashauer*, 57 F.3d at 1280. The critical issue is whether the trial court abused its discretion in finding no such danger; better yet, whether the appellate record clearly shows such an abuse.

1. No "Assumption Of The Risk" Defense Was Raised

No "assumption of the risk" instruction was needed because no such defense was raised. Santa Fe never suggested that Lozano should be found negligent simply because he used the rail bender. To the contrary, Santa Fe consistently maintained that the rail bender was safe if used properly. All of Santa Fe's evidence pointed unequivocally to the proposition that Lozano was at fault because he used the rail bender carelessly and in violation of company safety rules. He was not blamed for using the rail bender; he was blamed for using it incorrectly. Santa Fe's closing argument makes this clear. (S/F Vol. III, 327-350).

Lozano suggests Santa Fe injected "assumption of the risk" into the case. As explained below, this is false. Lozano argued that the rail bender was defective and presented abnormal, unreasonable risks; further, that Lozano's accident was proof. Santa Fe responded that the rail bender presented the same risks as any other rail bender; hence, it was not defective or abnormal. Santa Fe also argued that many necessary activities present risks, but that does not mean it is unreasonable to perform the activity or have an employee do so. These arguments were clearly directed at Lozano's negligence claim. None of them remotely suggested that Lozano should be found negligent simply because he used the rail bender. (S/F Vol. III, 330-333).

In addition, Santa Fe claimed Lozano was negligent in his manner of using the rail bender. Accordingly, Santa Fe argued that rail bending presented risks which Lozano knew or should have known would arise if he was careless. However, Santa Fe's argument was clearly directed

at the careless manner in which Lozano used the rail bender, not the fact that he used it. (S/F Vol. III, 335-338).

In short, Santa Fe merely sought to prove 1) the fact that an accident happened does not mean there was negligence or defective equipment, 2) the fact that rail bending presents risks does not mean asking someone to rail bend is negligent, and 3) Lozano was careless in the manner in which he used the rail bender. Accordingly, the trial court properly found that no "assumption of the risk" instruction was necessary. The evidence in the record proves this, as does the evidence omitted from the record.

2. The Trial Court's Ruling Complied With Federal Practice

As noted above, whether the trial court abused its discretion in refusing Lozano's explanatory instruction should be determined in light of state procedure and practice. However, even if federal practice governs, the trial court's ruling was proper.

In *Fashauer*, 57 F.3d at 1280-1281, the court rejected an argument like Lozano's. There, the FELA plaintiff slipped while standing in a vestibule with a wet floor. The railroad claimed he was negligent--not because he was in the vestibule (where he was supposed to be), but because he was not holding on to the handrails. In that regard, the railroad said at trial that "plaintiff is not a newcomer to the railroad"; further, that he knew the floor was wet. On appeal, plaintiff argued that the railroad's statements illicitly brought "assumption of the risk" into the case; hence, the trial court should have submitted an instruction on the matter. The court of appeals disagreed, observing that the railroad's statements merely indicated that the plaintiff should have known the risks of not grabbing the handrail, not that the plaintiff should have refused to remain in the vestibule. In the court's words:

> [D]efense counsel did not use these observations to build an argument that Fashauer should not have performed his

> job. Rather, she argued that he acted unreasonably in performing the task in the manner in which he did, and that the condition Fashauer encountered was not abnormal and therefore not proximately caused by (defendant's) negligence.

Fashauer, 57 F.3d at 1281. Lozano's use of the rail bender is analogous to Fashauer's presence in the vestibule, and Lozano's failure to use the rail bender properly is analogous to Fashauer's failure to grab the vestibule's handrails. Just as the railroad never suggested Fashauer was wrong to be in the vestibule, Santa Fe never suggested Lozano was wrong to use the rail bender. Accordingly, because no "assumption of the risk" instruction was warranted in *Fashauer*, none was warranted at bar.

Like *Fashauer*, most federal courts have condemned "assumption of the risk" instructions in FELA cases. In all the following cases, the courts found that giving "assumption of the risk" instructions was improper: *Casko*, 361 F.2d at 751("assumption of the risk" instruction "serves only to obscure the issues in the case"); *DeChico v. Metro-North Commuter R.R.*, 758 F.2d 856, 861 (2nd Cir. 1985)("assumption of the risk" instruction "particularly inappropriate ... where it might well cause such confusion as to water down or even eliminate the issue of contributory negligence"); *Clark*, 726 F.2d at 452("assumption of the risk" instruction in FELA cases "generally condemned"); *Heater v. Chesapeake and Ohio Ry. Co.*, 497 F.2d 1243, 1249 (7th Cir. 1974), *cert. denied*, 419 U.S. 1013 (1974)("assumption of the risk" instruction a "confusing negative statement which refers to issues not involved in a FELA case").

In claiming he was entitled to an "assumption of the risk" instruction simply because he was told to use the rail bender, Lozano misreads *Jenkins*, 22 F.3d at 208-212. In *Jenkins*, the employee was injured because he jumped on a moving flatcar. Despite evidence that the railroad specifically told him to jump on the flatcar, the railroad contended that such conduct violated company rules. What warranted

the "assumption of the risk" instruction was not the mere fact that the railroad ordered a task which presents risks; rather, it was the railroad's suggestion that the employee was wrong to do what he was specifically ordered to do.

Jenkins would apply to our case only if Santa Fe had 1) specifically ordered Lozano to maintain an improper stance while using the rail bender, or 2) argued at trial that Lozano was wrong to use the rail bender at all. But neither event occurred. To employ the language of *Jenkins,* Lozano received a "general order" to use the rail bender, not a "specific order" to use it in a negligent manner. The negligent manner was his choice, and it constitutes contributory negligence. There was no "assumption of the risk" issue.

The bottom line is that the railroad's order to use the rail bender did not warrant an "assumption of the risk" instruction. What is in the record and omitted from the record proves there was no abuse of discretion; moreover, the record deficiencies preclude finding otherwise.

D. Lozano's "Assumption Of The Risk" Instruction Was Confusing And Not Substantially Correct

We have argued that no "assumption of the risk" instruction was necessary under state or federal law. But there is another reason to affirm the rulings below. The instruction that Lozano tendered was confusing and not substantially correct. Therefore, it was properly refused; moreover, Lozano waived his complaint. As Tex. R. Civ. P. 278 states, the failure to submit an instruction is not grounds for reversal unless the tendered instruction is "substantially correct". See *Placencio v. Allied Indus. Int'l. Inc.,* 724 S.W.2d 20 (Tex. 1987) ("substantially correct" means correct in substance and not affirmatively incorrect).

If Santa Fe had argued that Lozano was wrong to use the rail bender at all, or if Santa Fe had ordered Lozano to use the rail bender with one foot on the jack, then the following "assumption of the risk" instruction

might have been proper:

> You may not find contributory negligence on the part of the plaintiff simply because he acceded to the request or direction of the responsible representatives of his employer that he work at a dangerous job, or in a dangerous place, or under unsafe conditions.

Fashauer, 57 F.3d at 1278, quoting *Joyce v. Atlantic Richfield Co.*, 651 F.2d 576, 683 (10th Cir. 1981). However, instead of tendering a correct instruction, Lozano tendered a confusing misstatement of law:

> If the employee protests, but then performs the commanded task, the risk of injury does not shift to him.

(Tr. 85).

Compare the correct "assumption of the risk" instruction with Lozano's "protest" instruction. The correct instruction says "don't blame the employee for doing his job (rail bending) in a certain manner (one foot on the jack) if that manner was specifically ordered." Lozano's instruction says "don't blame the employee for doing his job in **any** manner if he protested the job at the outset." That is quite a difference. For example, suppose that when asked to use the rail bender, Lozano said "I protest", then got drunk and proceeded to use the rail bender -- with one foot on the jack. The correct instruction would permit finding contributory negligence. But Lozano's instruction would preclude finding contributory negligence; after all, he protested, then performed the commanded task.

Lozano's "protest" instruction was confusing and wrong. Accordingly, the trial court had discretion to refuse the instruction; alternatively, Lozano waived his complaint. Either way, reversal is precluded.

II. ANY ERROR IN REFUSING THE "ASSUMPTION OF THE RISK" INSTRUCTION WAS HARMLESS

No error is ground for reversal unless the record shows it probably caused an improper judgment. Tex. R. App. P. 81(b). What is omitted from the record must be presumed to render any error harmless. *Christianson v. Prezelski,* 782 S.W.2d 842, 843 (Tex. 1990).

Lozano failed in his burden to show harm. The evidence in the record and omitted from the record proves there was no improper judgment; moreover, that Lozano would have fared no better with a correct "assumption of the risk" instruction. As the court of appeals properly concluded, the partial record before this Court precludes finding harmful error.

Lozano argues that federal law overrides *Christianson* by mandating reversal without regard to harm and no matter how incomplete the appellate record is. In this regard, Lozano misplaces reliance on *Norfolk & Western R. Co. v. Liepelt,* 444 U.S. 490 (1980). *Liepelt* did not address "assumption of the risk" instructions or the failure to produce an adequate record; rather, it addressed the need for an instruction that personal injury awards are not taxable.

Lozano reads *Liepelt* too broadly. *Liepelt* did not preempt state appellate law in FELA cases. Nor did it hold that any error in an FELA jury charge mandates reversal without regard to harm or the adequacy of the appellate record. *Liepelt* merely held that a tax instruction is needed to make sure the FELA measure of damages is applied. As for the harm caused by the absence of the tax instruction, *Liepelt* observed 1) most citizens wrongly assume personal injury awards are taxable and may tend to inflate verdicts accordingly, and 2) the jury's award in *Liepelt* greatly exceeded the estimate of plaintiff's own expert, suggesting an inflated verdict.

In short, *Liepelt* does not abolish the requirement of harmful error in FELA appeals. And even if the absence of the tax instruction is presumed harmful, it hardly follows that the absence of an "assumption of the risk" instruction mandates reversal without regard to what the record shows.

In refusing to reverse without an adequate statement of facts, the court of appeals properly followed *Christianson* and should be affirmed.

CONCLUSION

For the above reasons, Lozano's petition for writ of certiorari should be denied.

Respectfully submitted,

KENNETH J. BOWER
(Counsel of Record)
DOUGLAS W. POOLE
McLeod, Alexander, Powel & Apffel, P.C.
802 Rosenberg; P.O. Box 629
Galveston, Texas 77553
409-763-2481

Attorneys for Respondent

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No. 97-

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In The Supreme Court of the United States

OCTOBER TERM 1997

CONRADO LOZANO,

Petitioner,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the First Judicial Circuit of Texas

REPLY BRIEF OF PETITIONER CONRADO LOZANO

A. GLENN DIDDEL
Counsel of Record
THE DIDDEL LAW FIRM
1640 Mellie Esperson Building
815 Walker
Houston, Texas 77002
(713) 237-1000

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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Petitioner, Conrado Lozano ["Mr. Lozano"], for his brief, pursuant to Rule 15(6) of the Supreme Court Rules, in reply to the brief in opposition of respondent the Atchison, Topeka and Santa Fe Railway Company ["Santa Fe"], states as follows:

I.

Santa Fe's discussion of whether the Texas trial court erred is irrelevant; the court of appeals assumed there was error; it would not, however, follow federal law and decide the merits of the issues presented

Santa Fe spends the better part of its opposition discussing whether the Texas trial court erred in failing to give Mr. Lozano's instruction on assumption of the risk. See Santa Fe's brief in opposition at 4-12.[1] This entire discussion is irrelevant to the merits of Mr. Lozano's writ petition.

The court of appeals did not question whether the trial court erred in failing to give the instruction on any basis much less on any of the bases discussed by Santa Fe. To the contrary, the court of appeals assumed, without deciding, that the trial court erred in failing to give the instruction: "Assuming without deciding that the trial court erred in refusing Mr. Lozano's requested instruction, Lozano has not brought a sufficient record before this Court to show that the error harmed him." See the court of appeals' opinion at 3

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[1] Santa Fe's discussion breaks down into sub-questions of whether assumption of the risk was raised at trial, whether the instruction was necessary, whether the trial court had to give the instruction and whether the instruction was substantially correct. Ibid.

(emphasis added).[2] The net effect of the court of appeals' assumption of error is: assumption of the risk was raised at trial; the FELA[3] assumption of the risk instruction was required as a matter of law; Mr. Lozano's instruction was substantially correct, and the trial court erred in refusing it. Trial court "error" is not the real issue here.

What is in issue is the court of appeals' refusal to meet the merits of Mr. Lozano's appeal on the basis of the Texas harmless error rule. We contend that the Supreme Court's opinion in Liepelt foreclosed that option; instead, the court of appeals was required, under federal law, to determine reversible error on a per se basis given the trial court's refusal to give the FELA required instruction. See Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490, 492-3, 498 (1980)

The state-federal conflict here is easily stated. The court of appeals, relying on Texas appellate standards (the harmless error rule), says it assumes trial court error under the FELA but refuses Mr. Lozano his federal remedy of per se reversal. Liepelt sets out a different, conflicting standard: under Liepelt, Texas procedural law does not apply; federal law does, and federal law does not look to harmless error as Texas law would but rather to the question of error as a

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[2] The court of appeals' opinion is reprinted in its entirety as Appendix B to Mr. Lozano's writ petition. For the quoted material, see Appendix B at 12a.

[3] See the Federal Employers Liability Act, 45 U.S.C. §§51 et seq. For discussion of the requirement of the instruction under the FELA, see Mr. Lozano's writ petition at 3-4.

matter of law; that is: if the FELA instruction was required, it was reversible error without more for the trial court to refuse to give it. Id., 444 U.S. at 498.

Though the FELA instruction in Liepelt was a different mandatory instruction, the operant principle in Liepelt should generally control here because the Supreme Court set out a general federal rule applying to any case involving state court review of a trial court's failure to give a mandatory FELA instruction. Ibid. Because a mandatory instruction was required here, the court of appeals erred in failing to decide the issue, reverse the trial court's judgment and remand this case for a new trial. See Liepelt, 444 U.S. at 498.

II.

The only thing relevant in Santa Fe's opposition is its discussion of the would-be controlling nature of the Texas harmless error rule--which does nothing more than underscore the merits of Mr. Lozano's writ petition

The only relevant portion of Santa Fe's opposition is its wooden invocation of the Texas harmless error rule as somehow trumping the controlling federal standard of appellate review set out in Liepelt. See Santa Fe's brief in opposition at 13-4. Wrongfully assuming the validity of this erroneous conclusion, Santa Fe's position is, state, not federal rules control here. That's just wrong. As the Supreme Court noted in Liepelt, "whether it was error to refuse that instruction [under the FELA] . . . is a matter governed by federal law." Id., 444 U.S. at 492-3.

There was no limitation of Liepelt's reach and effect to simply one genus of FELA instruction. Moreover, there would be no reason why the Supreme Court would have done so; such a result would foreseeably lead to nothing but inconsistent and illogical results in FELA instruction cases based on which mandatory instruction was at issue. This would be plainly unconstitutional: if a party to an FELA case has a federal right to a mandatory FELA instruction, which mandatory instruction is at issue should be irrelevant to resolution of the controversy. What should control is the principle that a mandatory FELA instruction is generically a substantive right the denial of which is remediable as per se reversible error on appeal. Liepelt, 444 U.S. at 498.

III.

A comment on Santa Fe's misstatement of the record concerning the existence of the assumption of the risk issue and the propriety of Mr. Lozano's requested instruction

As noted, the court of appeals assumed error on the part of the trial court; hence, Santa Fe's discussion of, and mischaracterization of, whether assumption of the risk was in the case and whether Mr. Lozano's requested instruction was substantially correct is irrelevant. That point aside, because Santa Fe's discussion on these issues is a material misstatement of the record, we comment on it briefly.

There is no question Santa Fe knew full well that assumption of the risk was alive in this case; it discussed it candidly in a trial brief, denominated simply "ASSUMPTION OF THE RISK". There, Santa Fe tells us that the very same evidence that Mr. Lozano sought to limine out under the assumption of the risk doctrine was going to be

used by Santa Fe "as proof of contributory negligence." Appendix A at 1a-2a. Santa Fe rationalizes that this evidence must nevertheless go to the jury because, "Plaintiff's contributory negligence cannot be denied just because Defendant's evidence proving contributory negligence may also prove assumption of the risk [citation omitted]." Appendix A at 2a (emphasis added).

Santa Fe did what it said it was going to do; it offered and made comment on evidence that could reasonably lead jurors to conclude assumption of the risk was the cause in question during its deliberation on whether Mr. Lozano was contributorily negligent.[4] That is precisely the situation that gives rise to the mandatory FELA instruction on assumption of the risk. See Jenkins v. Union Pacific R. Co., 22 F.3d 206, 212 (9th Cir. 1994); Koshorek v. Pennsylvania R. Co., 318 F.2d 364, 369-71 (3rd Cir. 1963); Hamrock v. Consolidated Rail Corp., 155 Ill.App.3d 55, 501 N.E.2d 1274, 1279-80 (Ill.App. 1986). By Santa Fe's own description of the evidence and proof, the instruction was required here; the trial court erred in not giving it. For further discussion, see Mr. Lozano's writ petition at 2-5.

Next, Mr. Lozano's proposed instruction was, contrary to the suggestion of Santa Fe, "substantially correct." There is no federal form FELA instruction on assumption of the risk. The instruction used by Mr. Lozano was, however, straight out of the Supreme Court's opinion in Stone v. New York C., & St. L.R. Co., 344 U.S. 407, 409 (1953). There, the Supreme Court said, in regard to the

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[4] See, infra, at 6-7, for the discussion at the charge conference as to Santa Fe's raising of assumption of the risk during trial.

nonapplicability of assumption of the risk in an FELA case, "the fact that the employee commanded to do the act that caused the injury, first protested does not place the risk of injury on him." Ibid. That's literally what Mr. Lozano proposed to the Texas trial court as his instruction. A copy of Mr. Lozano's instruction is included with this reply as Appendix B.[5]

Stone is still good law. The Supreme Court's terse, generic statement of the inapplicability of assumption of the risk set out there is more than adequate as an instruction. Santa Fe did not even brief Stone, much less offer any authority as to why it would not create the relevant instruction standard in this case. Mr. Lozano's reliance on Stone was entirely appropriate; the instruction was fine as submitted.

We don't have to wonder whether Mr. Lozano informed the Texas trial court of Stone; the case was presented to the trial court during the charge conference and, we believe, went largely ignored by the Texas trial court as is evidenced by the following exchange between Mr. Lozano and the judge:

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[5] Appendix B contains on its face the citation to Stone and a second Supreme Court case, Blair v. Baltimore & Ohio Railway Co., 323 U.S. 600 (1945). These citations were in the original proposed instruction; we, however, failed to include the citations, through oversight, in transcribing the instruction in our writ petition.

MR. HAAG [counsel for Mr. Lozano]:

> There has been a whole lot on the part of defense lawyers talking about risk, hazard, danger, and my client, Mr. Lozano knew there was risk involved and its kind of like he accepted the risk.
>
> That's why I think this instruction that says "If the employee protests, but then performs the commanded task, the risk of injury does not shift to him."
>
> I have my cite there Stone v. New York C.&St. L.R. Co., 344 U.S. 407.
>
> Blair v. Baltimore and Ohio Railway Co., 323 U.S. 600 and other cites with it.

THE COURT:

> Plaintiff's proposed instruction on assumption of the risk is refused.

Volume III, trial statement of facts of March 28, 1995, at 325-6, a copy of these excerpted pages from the statement of facts is included as Appendix C here. See Appendix C at 5a.

Curiously, while Santa Fe argues here long and hard about the propriety of Mr. Lozano's instruction, it had nary a word to say about it at trial. See Appendix C at 6a.

IV.

Conclusion

For the reasons stated in Mr. Lozano's writ petition, there is good cause for the Supreme Court to grant Mr. Lozano's writ. Santa Fe's brief in opposition offers very little in the way of relevant response to the writ petition and what it does say does nothing more than underscore the need for the granting of this writ to ensure that controlling federal precedent will be followed in the Texas state courts on issues where federal law, not state law, controls appellate review.

Respectfully submitted,

A. Glenn Diddel III
(Counsel of Record)
THE DIDDEL LAW FIRM
1640 Mellie Esperson Building
815 Walker
Houston, Texas 77002
(713) 237-1000
(713) 237-1006 (Fax)

ATTORNEY FOR PETITIONER

APPENDIX

APPENDIX A

CAUSE NO. 93-14480

CONRADO LOZANO, Plaintiff
V.
ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, Defendants

In the 152nd Judicial District Court
of Harris County, Texas

ASSUMPTION OF THE RISK

Assumption of the risk has been abolished not only in F.E.L.A. cases but in all negligence cases. LOZANO would seek to limine out all evidence of his own conduct arguing that it is all "assumption of the risk."

THE FACTS

LOZANO claims injury after he stumbled because a Jim Crow jack detached from the rail. The Railway Company denies the jack was defective and LOZANO contends it was defective. The Railway Company will offer

evidence that when using this or any other hand tool, it is important to assume a safe stance and position so that you are balanced. Other witnesses will testify that When using any jack (including a Jim Crow jack) or lining bar or pry bar or claw bar, you must be prepared for slipping so that you will not lose your balance or be injured. The Santa Fe Safety Rules require that hand tools be used defensively. Rule 3002 states: "Tools must be used defensively so that slipping or unexpected movement will not cause loss of balance or injury.

This type of evidence is clearly admissible as proof of contributory negligence.

Violation of a Safety or Operating Rule that is sufficiently specific is evidence of contributory negligence. Louisville N.R. Co. v. Parker, 138 S.W. 231 (Ala. 1931), cert dis'm. 53 S.Ct. 93 (1932); AT&SF Railway Company v. Ballard, 105 F.2d 768 (5th Cir. 1940), cert denied 60

S.Ct. 1096 (1940); Flanigan v. Burlington Northern, Inc., 632 F.2d 88 (8th Cir. 1980).

Assumption of the risk is not a defense under the F.E.L.A. but the defense of the Plaintiff's contributory negligence cannot be denied just because the Defendant's evidence proving contributory negligence may also prove assumption of the risk. Beanland v. Chicago Rock Island and Pacific Railroad Co., 480 F.2d 109 (8th Cir. 1973).

An instruction advising that assumption of the risk is not a defense in F.E.L.A. cases should generally not be submitted to a jury. Casko v. Elgin, Joliet & Eastern Railway Co., 361 F.2d 748 (7th Cir. 1966); Heater v. Chesapeake & Ohio Railway Co., 497 F.2d 1243 (7th Cir.

1974); Clark v. Burlington Northern, 726 F.2d 448 (8th Cir. 1984).

Respectfully submitted,

McLEOD, ALEXANDER, POWEL & APFFEL, P.C.

By /s/
Douglas W. Poole
TBA #16115600
802 Rosenberg
P. O. Box 629
Galveston, Texas 77553
Telephone: (309) 763-2481
FAX: (409) 762-1155

Attorney for Defendant,
The Atchison, Topeka and
Santa Fe Railway Company.

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of March, 1995, I served the above and foregoing Assumption of the Risk by hand delivery to opposing counsel.

/s/
Douglas W. Poole

APPENDIX B

Instruction No. _____

If the employee protests, but then performs the commanded task, the risk of injury does not shift to him.

/s/ "3/29/95
Refused
Harriet O'Neill"
Judge Presiding

Stone v. New York C.&St. L. R. Co., 344 U.S. 407, 73 S.Ct. 358, 97 L.Ed 331 (1953);
Blair v. Baltimore & O.Ry., Co., 323 U.S. 600, 605, 65 S.Ct. 545, 89 L.Ed. 490 (1945).

APPENDIX C

MR. HAAG: There has been at [sic] whole lot on the part of the defense lawyers talking about risk, hazard, danger, and my client, Mr. Lozano knew there was risk involved and it is kind of like he accepted the risk.

That's why I think this instruction that says "If the employee protests, but then performs the commanded task, the risk of injury does not shift to him."

I have my cite there Stone v. New York C. & St. L.R. Company, 344 U.S. 407.

Blair v. Baltimore & Ohio Railway Company, 323 U.S. 600, and other cites} [sic] with it.

THE COURT: Plaintiff's proposed instruction on assumption of the risk is refused.